

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1262

To be argued by
GUSTAVE H. NEWMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1262

UNITED STATES OF AMERICA,

Appellee,

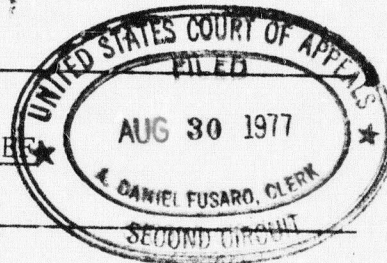
- against -

THEODORE G. DALEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF



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Appellee,

- against -

THEODORE G. DALEY,

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APPELLANT'S REPLY BRIEF

Preliminary Statement

This reply brief is respectfully submitted in response to the brief filed by appellee United States of America which, in turn, was submitted in response to appellant's main brief urging reversal of a judgment of the United States District Court, Southern District of New York (Lasker, J.) convicting the defendant of conspiracy to violate and violating the Hobbs Act (18 U.S.C. 1951), and with improperly accepting goods and services in violation of 29 U.S.C. 186 and imposing sentence.

POINT I

DALEY'S CONDUCT IS NOT PROSCRIBED BY THE
HOBBS' ACT

Two aspects of our claim that Daley's conduct is not legitimately the subject of a Hobbs Act prosecution deserve further comment in light of the Government's answering papers. The areas involved are the interstate commerce element and the racketeering requirement of the Hobbs Act.

A. There was No Interference With
Interstate Commerce

The Government cites United States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970), for the proposition that conduct which "in any way or degree" interferes with interstate commerce is prohibited by 18 U.S.C. §1951, even if the effect is only minimal. We agree that this is a correct statement of the law. However, if the interstate commerce element is to have any meaning at all, the requisite effect on interstate commerce must be more than mere speculation or conjecture. It is easy to play the game of word association with any human endeavor and create a chain linking the activity to interstate commerce. For this day and age of modern technology and transportation and the resultant shrinking of the nation, it would be impossible to engage in any activity which is not in some degree connected with interstate commerce.

Indeed, if the types of activities engaged in by defendant Daley in this case are held sufficient to satisfy the Hobbs' Act, then the interstate commerce element might just as well be exorcised for it would have become nothing more than a vestigial organ, a once vital but now useless criteria.

Now then, let us look at the specific factors which the Government has alleged were sufficient to meet the interstate commerce element. First, they state that the victims of the extortion were either workers or contractors on an interstate highway and that Daley could influence whether or not they would continue to work on that highway. However, this argument fails to consider that it was the local union's function, and therefore Daley's function, to supply drivers for the thruway project. If, in fact, Daley had exercised his power upon a driver's refusal to submit to the extortion*, the highway project would not have been affected because another driver would simply have replaced the old one. The only thing that would have been affected was the employment status of two individual drivers. Whether the New York State Thruway gets repaired by the labors of any particular individual cannot possibly be said to affect the interstate commerce which will utilize that highway in the future. In addition, Daley had no power to influence whether the contractors continued to work on the highway.

*On the contrary, Daley did not exercise such power.

Second, the Government cites United States v. Addonizio, 451 F.2d 49, 77 (3dCir.), cert. denied, 405 U.S. 936 (1972), and Hulahan v. United States, 214 F.2d 441, 445 (8th Cir), cert. denied, 348 U.S. 856 (1954), for the principle that:

"exaction of tribute from contractors engaged in local construction work... who are engaged in constructing facilities to serve...[interstate] commerce, is, in our opinion, proscribed by the [Hobbs Act]." 214 F.2d at 445.

However, Hulahan, from which this quote was extracted, did not involve construction of facilities to serve interstate commerce but rather construction by contractors who are dependent on interstate commerce for materials and supplies. And even if this principle were to be accepted as valid, it would not apply to the drivers who are not contractors. The theory of interference under this principle is based on the concept that if money is taken from a contractor who is constructing a facility to serve interstate commerce, his ability to build the facility will be hampered and commerce will thereby be affected. This theory cannot be applied to the drivers who were merely supplying their labor on their own free time.

Next, the Government contends that, since the victims customarily purchased supplies and materials in interstate commerce, the commerce element was fulfilled. To illustrate this point, they maintain that the truckers ordinarily purchased their trucks, parts, equipment and gasoline

in interstate commerce. This represents a most vivid example of the chain of word association that can connect any activity with interstate commerce. Assuming that all motor vehicles and gasoline are products of interstate commerce, one would merely have to show that transportation was in some degree involved in the extortion to bring the act within the Hobbs' Act. Examining the role played by the trucks and gasoline, we contend that the use of trucks and gasoline was merely incidental in their affect on commerce. Assuming that Daley was going to build a driveway whether he paid for it or not, the use of trucks and gasoline is a necessity. Therefore, the affect on interstate commerce by means of the employment of trucks and gasoline did not result from the extortionate activity, but from Daley's decision to build a driveway -- a decision which he certainly was entitled to make. See United States v. Merolla, 523 F.2d 51, 55 (2d Cir. 1975), where the Second Circuit said:

"We do not see how [defendant] can be subject to prosecution under this statute for restraining or affecting his own commerce where he has a right to lawfully choose to cease construction or abandon the business of selling automobiles."

Furthermore, the Government attacks our use of Merolla in another context. We do not agree that Merolla merely reaffirmed existing law in holding that the activities involved did not affect interstate commerce. While Merolla did reaffirm that the Hobbs' Act requires interference with

interstate commerce, it re-examined the types of activity which constitute such interference. Merolla stands for the proposition that the interstate commerce element of the Hobbs' Act is not just a paper tiger, but that it still has some meaning.

The Government attempts to distinguish Merolla factually by pointing out that here the victim drivers, truck owners and construction companies were involved continuously with the flow of interstate goods and services before, during and after the extortion whereas, in Merolla, the victim's only purchases of goods from out of state had been completed before the extortion began. Such broad assertions sound convincing but are really off the mark. We assume that the continuous flow of goods and services mentioned relate to the trucks and gasoline. We have already dealt with them. However, it is inconceivable that trucks and gasoline were not in continuous use in the construction of a large building such as in Merolla. Rather, we contend the Merolla Court was not concerned with the de minimus connections that the construction project might have had with interstate commerce. They were more concerned with the shipments of large quantities of building supplies from out of state. Such shipments are the types of activity which are more properly the subject of interference and the foundation on which a Hobbs' Act violation may be laid.

Finally, the Government's argument that Local 445's relationship with the International Brotherhood of Teamsters fortifies satisfaction of the interstate commerce element is so spurious that it deserves only short rebuttal. This contention is another prime example of following a chain of associations until an interstate connection is found. The relationship with the International is irrelevant and unrelated to any and all of the activities which are alleged to have violated the Hobbs' Act.

If the Court finds that the interstate commerce element has not been fulfilled with respect to either the truckers, the construction companies or Hudson Cement, then defendant's conviction under the Hobbs' Act must be reversed. The failure of the Government to charge separate counts for the various alleged extortionate activities renders it impossible to determine just which activities the jury found to be extortionate. For example, the jury may have convicted on the basis that there was extortion only with respect to the truckers and that the construction companies and Hudson Cement had given supplies according to local custom. Thus, if the interstate commerce element with respect to the truckers fails, the conviction is invalid and must be reversed. Since it cannot be ascertained which acts the jury held to be extortionate, the failure of the interstate commerce element with regard to any of the three entities -- i.e., the truckers,

the construction companies, and Hudson Cement -- mandates reversal.

B. Daley's Conduct Did Not Constitute Racketeering

Although not appearing on the face of the statute, it was the Congressional purpose of the Hobbs' Act to combat racketeering. See United States v. Yokley, 542 F.2d 300 (6th Cir. 1976); United States v. Culbert, 548 F.2d 1355 (9th Cir. 1977).

The Government offers United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), cert. denied, 97 S.Ct. 1160 (1977), to refute this line of reasoning. While the Court in Brecht held that a single incident of the use of economic fear by a private purchasing agent was within the scope of the Hobbs' Act, it did so because it found no limitation in the Act's definition of extortion which would exclude such activity. The Court, however, was clearly concerned with the fact that the activity did not fit one of the traditional areas which the Hobbs' Act was designed to control. We respectfully suggest that it is now time to re-examine Congress' true intent with respect to the scope of the Hobbs' Act.

As Mr. Justice Learned Hand once wrote, "There is no surer way to misread any document than to read it literally." Guiseppe v. Walling, 144 F.2d 608, 624 (2d Cir. 1944). He

reiterated this thought a year later:

"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404, 66 S.Ct. 193 (1945).

These sentiments were foreshadowed by Mr. Justice Felix Frankfurter in United States v. Monia, 317 U.S. 424, 431, 63 S.Ct. 409, 413 (1943) (dissenting opinion):

"This question cannot be answered by closing our eyes to everything except the naked words of the [statute]. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."

We will not repeat the entire argument we made in our original brief that the Hobbs' Act requires a showing of "racketeering" and that no such "racketeering" was present in the instant case. Suffice it to say that the Government, in its brief, attempts to counter in this regard merely by stating that our reliance on United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007 (1973), was inappropriate. This contention is erroneous for we were not relying on Enmons for the proposition that the Hobbs' Act required racketeering. Rather, Enmons merely prefaced a re-examination of the scope of the Hobbs' Act in cases such as

Yokley and Culbert which did require a finding of racketeering to convict a person under the Hobbs' Act. The Government's answer, of course, did not even attempt to distinguish these cases, for to do so would have been futile.

We would point out that we are not contesting the convictions for counts under 29 U.S.C. §186 (1970). However, local nature of the alleged extortionate activities leads one to conclude that such acts have no business under federal jurisdiction, but should be locally prosecuted. In this regard, the Second Circuit's opinion in United States v. Tavoularis, 515 F.2d 1070, 1077 (1975), is illustrative:

"We reverse these convictions with reluctance and regret. The evidence tending to prove that these defendants possessed stolen property knowing it to have been stolen was overwhelming. Unfortunately, the statute under which the government chose to bring this prosecution required more, and on that additional element the government failed--and totally failed--to prove its case. Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonable doubt that he committed the particular crime with which he is charged. The prosecutorial branch of the law enforcement establishment is quite properly vested with considerable discretion in deciding what charges to bring against whom, but in this case the improvident exercise of that discretion--not only in selecting the particular statute under which the case proceeded, but also, and more fundamentally, in pursuing this matter in federal court rather than turning it over to state authorities for prosecution in a more appropriate forum--has caused the release of three proven criminals who ought to be in prison."

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Thus, because the activities by defendant did not affect interstate commerce nor did they constitute "racketeering", the conviction for violations of the Hobbs' Act must be reversed and the indictments dismissed.

The thrust of Appellee's Point V is to impale a lay defendant upon his failure to recall prior judicial contact until the issue was raised during the course of a prosecutorial sidebar offer-of-proof. No attempt is made to explain why the Government did not apprise the trial Court and defense counsel in advance of that, or as soon thereafter as the United States Attorney's Office became aware of this (see, Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 [1972]), to allow a proper recusal application to be made or knowingly waived prior to the attachment of jeopardy. We strongly question the motives of the Government's prosecutor in keeping the facts underlying the motion to themselves -- facts which only came to light because the Government sought to improperly make Judge Lasker's prior fact findings known to the jury.

This Court can be well assured that if the situation was reversed and Judge Lasker had previously ruled either favorably upon the credibility of defense witness or adversely to some of the prosecution's witnesses, a pre-trial conference would have been requested by the Government to explore and adjudicate the prior involvement. Clearly, knowing Governmental silence herein, under a time and circumstances when they were obligated as officers of the court to speak, is a factor in the equation of recusal which cannot and should not be overlooked.

Furthermore, prosecutorial claims (see pp. 30-31 of Appellee's brief) that Daley had heightened awareness of Judge Lasker's prior contact because "...Judge Lasker's comments were matters of public record personally known to Daley and to Local 445's civil attorneys, who represented the union in the civil case and assisted Daley below in this case" (Tr. 1092) are not supported by the record. As Gustave H. Newman, defendant's trial counsel, below stated:

"The gentleman who tried the case on behalf of the Union is no longer with the firm that represents the union so that they had a problem locating all of this material."

Clearly this was not a situation where Daley's current attorneys had actual or constructive knowledge of the facts but knowingly closed their eyes to them for tactical reasons. The fact is that the only person with knowledge was no longer associated with the civil law firm. Hence the Government's reliance upon prior actual knowledge is unsupported by the record.

Insofar as the actual merits of the Government's response are concerned, no Second Circuit case has been cited which supports the handling of a trial court recusal motion where the recusing judge declined even to forward the motion to another judge as required by 28 U.S.C. 144.

Furthermore, the Second Circuit cases which are cited, United States v. Wolfson, ___ F.2d ___, slip opn. 4021 (2d Cir. 1977), and United States v. Bernstein, 533 F.2d 775, 785 (2d Cir. 1976), cert. den. 97 S.Ct. 523 (1977), are distinguishable. The Wolfson case dealt with an appeal from an order of Judge Palmieri denying a coram nobis application. The issue of recusal had been raised on Wolfson's direct appeal and had been fully passed upon by the nisi prius court and reviewed on appeal to this Court. Thus the sole question was the propriety of Judge Palmieri's decision to entertain a motion seeking to collaterally attack the underlying judgment of conviction. Such an analysis of recusal in that context is far different from assessing the propriety of presiding at the trial proper ab initio.

Furthermore, to the extent the Wolfson decision is helpful and relevant to the case at bar, such is, we contend, solely for the defense. As the panel noted in its opinion:

"We recognize that [28 U.S.C.] 455(a) is designed to negate the duty to sit 'notion and to allow a greater flexibility in determining whether disqualification is warranted in particular situations.' United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976), cert. denied, 97 S.Ct. 370 (1976). Also, we do not read the authorities referred to above as holding that a Judge's conduct at proceedings before him can never form a basis for finding bias." See United States v. Wolfson, supra, at pp. 4028-4029.

Finally, the panel's holding in United States v. Bernstein, supra, is likewise distinguishable and inapplicable to the facts at bar. In Bernstein the attack upon former Judge Travia's denial of defendant's recusal was apparently brought merely under 28 U.S.C. 144 and not also under the more expansive and recusal sensitive and amended Sec. 455 (cf. United States v. Wolfson, supra). In addition, as Judge Oakes made clear, Judge Travia's general remarks, which formed the basis of the 28 U.S.C. 144 motion, were uttered in the course of judicial proceedings in the very case on appeal. They did not stem from prior fact finding at earlier proceedings. In any event, we note that Sec. 455 was apparently not applied by the Court in affirming Judge Travia's recusal denial.

The mandate of 28 U.S.C. 144 and 445 having been met, referral to another judge for adjudication was mandated. The rendition of justice and the appearance of justice requires nothing less. A reversal and remand for a new trial, before a different judge, should be ordered.

POINT III

MULTIPLE IMPROPRIETIES IN THE GRAND JURY FATALLY TAINTED THE INDICTMENT REQUIRING ITS DISMISSAL (Answering Point VII of Appellee's Brief)

In Point VI of appellant's initial brief, we evinced our concern that numerous departures from proper Grand Jury practice, affecting substantial constitutional rights, deprived defendant Daley of a fair Grand Jury presentation.

In the first instance, we questioned whether the dictates of United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), relating to the use of hearsay evidence before the Grand Jury, were met. Our stated concern was whether the Grand Jury was told that it was getting hearsay evidence and that if direct evidence was requested, it would be obtained.

The Government's response at p. 35 of its brief fails to undermine our concern that the Grand Jurors were not told the prior Grand Jury testimony was hearsay and not the best evidence. Furthermore, it appears there is no record which will even confirm that if transcripts of prior testimony were read, they were read fully and fairly. Cf. United States v. Crutchley, 502 F.2d 1195, 1199-1200 (3d Cir. 1974); United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975).

The Government contends (Appellee's brief, pp. 35-36) that a defendant "has no right to insist that all witnesses appear before the Grand Jury". However true that statement may

be in a general case, when the first Grand Jury does not vote an indictment and an indictment is sought years later before a different Grand Jury, the failure to call known exculpatory witnesses (viz. Michael Spada, Sr., Harley Williams and Edward Hahn) or introduce exculpatory evidence before the indicting Grand Jury can amount to a deprivation of due process of law. See Johnson v. Supreme Court, 18 Cr.L. 2054, 2055 (Cal. Sup.Ct. 1975); People v. Ferrara, 82 Misc.2d 270 (Sup.Ct. 1975); People v. Root, 87 Misc.2d 482, 384 N.Y.S. 2d 951, 951 (Sup.Ct. 1976); see also "Code of Professional Responsibility", EC 7-13.

In addition, appellee's reliance upon cases such as United States v. Eucker, 532 F.2d 249, 255-256 (2d Cir. 1976) and United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975), is misplaced. In Eucker the claimed suppressed testimony was largely of a privileged nature. Furthermore, this testimony did not consist of prior Grand Jury testimony, as herein, which was already in the possession and control of the United States Attorney's Office and could be read to the Grand Jury just as easily as the pro-Government prior Grand Jury testimony. Only a unitary desire to indict at any cost can explain such a selective Grand Jury presentation. Similarly, the facts in Del Toro are likewise distinguishable.

Insofar as our contention that the failure to record the minutes of all the proceedings before the Grand Jury is concerned, it appears from the nature of the Government's response at p. 36 of its brief that once again it has chosen, for its own reasons, to disregard the clear warnings given in United States v. Peden, 472 F.2d 583, 584 (2d Cir. 1973), to "clean up" the Grand Jury presentations and to record them. Just as in United States v. Esteppa, supra, the time has come to utilize the Court's supervisory power over Grand Jury practice to insure the recordation of proceedings is adhered to. The failure to do so will, unfortunately, continue the opportunity for Grand Jury abuse.

Finally, we contended that recordation was important not merely because of the deterrent value contemporaneous memorialization achieves, but to insure that the indicting lay Grand Jury was properly instructed upon the law so it could decide which violation of federal law, if any, occurred. This becomes particularly important when one considers the complex jurisdictional predicate and actual conduct which must be prima facie established to prove the existence of a conspiracy and the actual conduct claimed to be criminal.

A reading of p. 36 of the Government's brief fails to insure us that the Grand Jury was even read or fully and fairly explained the complex statutes involved prior to being

asked to return a "true bill". It was for these reasons, which affect Grand Jury practice throughout the tri-state realm of this Court's mandate, that review and inspection in this Court is sought.*

*While it is true that our dismissal motion was not made until after the Government rested, it was only then, for the first time, based upon prior receipt of Jencks Act ("3500") material, that a proper basis to move for inspection existed. In view of the secret nature of Grand Jury testimony, it is clear the application was made as timely as possible and can be entertained. See Rules of Criminal Procedure, Rule 12[f].

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND REMANDED
FOR A NEW TRIAL. COUNTS ONE AND TWO SHOULD
BE DISMISSED.

Respectfully submitted,

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